

## SCRIBBLE SCRABBLE, THE SECOND AMENDMENT, AND HISTORICAL GUIDEPOSTS: A SHORT REPLY TO LAWRENCE ROSENTHAL AND JOYCE LEE MALCOLM

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In a recent article Professors Lawrence Rosenthal and Joyce Lee Malcolm provided an intriguing debate<sup>1</sup> over the standard of scrutiny that should be applied to restrictions on the Second Amendment in the wake of *McDonald v. City of Chicago*.<sup>2</sup> This Article sets forth to illuminate two aspects of that debate. The first is Professor Rosenthal's concern on the constitutionality of open-carry or conceal-carry prohibitions. He inaccurately claims that the founders left insufficient historical evidence to support such prohibitions.<sup>3</sup> Thus this Article addresses those concerns through the use of "historical guideposts."<sup>4</sup> The second aspect this Article sets forth to address is Rosenthal and Malcolm's characterization of the Second Amendment's "well-regulated militia" language,<sup>5</sup> for it highlights a historical and legal error that continues to pollute contemporary Second Amendment jurisprudence. As this Article will explain, a "well-regulated militia" does not

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<sup>1</sup> See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. City of Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/24/LRColl2010n24Rosenthal&Malcom.pdf> (link).

<sup>2</sup> 130 S. Ct. 3020 (2010) (link).

<sup>3</sup> See Rosenthal & Malcolm, *supra* note 1, at 88.

<sup>4</sup> Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. City of Chicago*, 2010 AKRON J. CONST. L. & POL'Y 7 (2010), <http://www.akronconlawjournal.com/articles/patrick-charles.pdf> (link).

<sup>5</sup> See Rosenthal & Malcolm, *supra* note 1, at 91–94, 106, 113–14.

merely equate to “well-trained,”<sup>6</sup> nor is it a vehicle to analyze gun control regulations<sup>7</sup> in the constraints of the opinion in *District of Columbia v. Heller*.<sup>8</sup>

# I. SCRIBBLE SCRABBLE REDUX: HISTORICAL GUIDEPOSTS, THE PUBLIC GOOD, AND THE SECOND AMENDMENT

As Professor Rosenthal astutely points out,<sup>9</sup> the *Heller* Court has received much criticism for its classification of long standing prohibitions.<sup>10</sup> He then poses the question as to whether *Heller*’s presumptively lawful prohibitions will “one day be discarded as inconsistent with the original meaning of the Second Amendment,” for “[f]raming-era practice appears to be of little help.”<sup>11</sup> Indeed, the *Heller* Court painted with a broad stroke what constitutes a “presumptively lawful” firearm regulation.<sup>12</sup> However, it is improper to claim that the Founding Fathers did not provide us with some guidance as to whether a challenged regulation falls within the constitutional restraints of the Second Amendment.<sup>13</sup>

What we today refer to as gun control is not a twentieth century phenomenon. Since the Norman Conquest, restrictions began appearing on the carrying or using of “arms” as a means to prevent public injury. King Alfred had restrictions on the drawing of any weapon “in the king’s hall”<sup>14</sup> and the improperly carrying of a spear as to prevent injury.<sup>15</sup> In 1328, King Edward III implemented restrictions on riding or going armed in public places or in the presence of government officials.<sup>16</sup> In 1542, King Henry VIII placed a prohibition on “little short handguns, and little hagbuts,” which were a “great peril and continual fear and danger of the Kings loving subjects.”<sup>17</sup> Likewise, in 1787 the Pennsylvania Minority Dissent, which was comprised of those members of the Pennsylvania Constitution Conven-

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<sup>6</sup> Compare *id.* at 106, with Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN L.J. 1, 2–85 (forthcoming 2011).

<sup>7</sup> Rosenthal & Malcolm, *supra* note 1, at 91–94.

<sup>8</sup> 128 S. Ct. 2783 (2008) (link).

<sup>9</sup> Rosenthal & Malcolm, *supra* note 1, at 91–92.

<sup>10</sup> *Heller*, 128 S. Ct. at 2816–17.

<sup>11</sup> Rosenthal & Malcolm, *supra* note 1, at 92.

<sup>12</sup> *Heller*, 128 S. Ct. at 2816–17 & n.26.

<sup>13</sup> See Rosenthal & Malcolm, *supra* note 1, at 91–92 (“Commentators have suggested that the Court took a categorical approach in which ‘core’ Second Amendment interests receive something close to absolute protection, while more penumbral interests are subject to greater regulation. Still, it is far from clear how to go about determining whether a challenged regulation implicates only penumbral interests. Framing-era practice appears to be of little help.”).

<sup>14</sup> THE LAWS OF THE EARLIEST ENGLISH KINGS 69 (F.L. Attenborough ed., 1922).

<sup>15</sup> *Id.* at 79–81.

<sup>16</sup> 2 Edw. 3, c. 3 (1328) (Eng.) (link).

<sup>17</sup> 33 Hen. 8, c. 6, § 1 (1541) (Eng.).

tion that voted against ratifying the Constitution due to the lack of a Bill of Rights, acknowledged it was lawful to disarm individuals for “crimes committed” or when the legislature determined there may be “real danger of public injury from individuals.”<sup>18</sup>

What this brief overview reveals is that “arms” regulations to preserve the peace, as well as prevent public injury, are part of our Anglo-American tradition. Whether there is a perfect eighteenth century parallel to modern gun control regulations is not the appropriate question that jurists should examine when determining whether Second Amendment challenges are consistent with framing-era practice.<sup>19</sup> For with the advancement of firearm technology, especially the portability, firing rate, and power by which modern firearms operate, it is the rare occurrence that a modern gun control regulation will mirror an eighteenth century restriction.<sup>20</sup>

Therefore, the proper question jurists should ask when examining the historical acceptance of modern gun control regulations is whether the regulation would be “publicly accepted” in the framing era. In other words, the question is whether the founders would have accepted the restriction as necessary to prevent “public injury” or as in the interest of the “public good.”<sup>21</sup> This question is answered by examining the ideological and philosophical origins of gun control, not by finding an exact eighteenth century parallel. While one may argue this form of judicial inquiry resembles Justice Breyer’s interest-balancing approach in a historical form,<sup>22</sup> the fact of the matter is that the entire purpose of the Second Amendment was the furtherance of the “public good.”<sup>23</sup> This holds true whether one examines the “right to keep and bear arms” in either the constraints of the *Heller* right to self-defense of the home or as a militia right to take part in the common defense.<sup>24</sup>

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<sup>18</sup> *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania, to Their Constituents*, PENN. PACKET, AND DAILY ADVERTISER, Dec. 18, 1787, at 1 (link).

<sup>19</sup> For a variance of approaches in examining the historical pedigree of modern gun-control regulations with the framing, see *United States v. Chester*, No. 09-4084, 2010 U.S. App. LEXIS 26508, at \*13–20 (4th Cir. Dec. 30, 2010) (following the Seventh Circuit Court of Appeals in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009)) (link); *United States v. Rene E.*, 583 F.3d 8, 11–12 (1st Cir. 2009) (looking first to nineteenth century state laws imposing similar restrictions as the *Heller* Court did) (link); *United States v. Skoien*, 587 F.3d 803, 808–09 (7th Cir. 2009), *vacated by reh’g en banc*, 614 F.3d 638 (7th Cir. 2010) (link); and *United States v. Brown*, 715 F. Supp. 2d 688, 695–99 (E.D. Va. 2010) (discussing the history of the arms restrictions at the founding).

<sup>20</sup> Charles, *supra* note 4, at 13, 15, 38.

<sup>21</sup> *Id.* at 33–39.

<sup>22</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

<sup>23</sup> Charles, *supra* note 6, at 74–75.

<sup>24</sup> See *United States v. Schwimmer*, 279 U.S. 644, 650 (1929) (link); *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886) (link).

To illustrate this point, this Article will examine a 1786–87 editorial debate over the constitutionality of the Portland Convention.<sup>25</sup> The Convention was an assemblage of Maine counties that discussed a separation from Massachusetts.<sup>26</sup> Although the Convention sought to exercise legal means to form an independent Maine, the Convention raised suspicions of another rebellion like Shays’ Rebellion, which was taking place at the same time.<sup>27</sup> Illegal assemblages of armed men were shutting down courthouses throughout Massachusetts, leaving much uncertainty as to the future of the new American Republic.<sup>28</sup>

The debate began with an editorial penned by the anonymous Senex. He described the different assemblages as “mere mobs” in violation of the 1780 Massachusetts Constitution.<sup>29</sup> In particular, Senex thought these assemblages violated Articles VII and XIX of the Massachusetts Declaration of Rights. Article VII embodied William Blackstone’s right of governmental self-preservation,<sup>30</sup> while Article XIX was a First Amendment predecessor.<sup>31</sup>

Although there was no Massachusetts statute stating these independent assemblages were unlawful, Senex asserted they were “evil and dangerous—subversive of all order, peace, or security.”<sup>32</sup> He viewed these “County Mobs” as violating the law because Articles VII and XIX provided the constitutional vehicle to redress grievances.<sup>33</sup> In other words, “the people of

<sup>25</sup> For previous commentary on this debate, see Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 197–98 (2007) (link); and Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 170–71 (2007) (link).

<sup>26</sup> 1 WILLIAM WILLIS, THE HISTORY OF PORTLAND, FROM ITS FIRST SETTLEMENT: WITH NOTICES OF THE NEIGHBORING TOWNS, AND OF THE CHANGES OF GOVERNMENT IN MAINE 253–56 (Portland, Me., Day, Fraser & Co., 1831) (link).

<sup>27</sup> *Id.*

<sup>28</sup> See PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 43–44, 83–87 (2009).

<sup>29</sup> Senex, *Shades of Retirement*, CUMBERLAND GAZETTE (Portland, Me.), Sept. 21, 1786, at 2.

<sup>30</sup> MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. VII (“[T]he people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”) (link). For a history of Blackstone’s right of self-preservation and resistance, see Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the English-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 (2010), [http://www.cardozolawreview.com/index.php?option=com\\_content&view=article&id=132:charles201018&catid=20:firearmsinc&Itemid=20](http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=132:charles201018&catid=20:firearmsinc&Itemid=20) (link).

<sup>31</sup> MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XIX (stating that “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request the legislative body, by way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”).

<sup>32</sup> Senex, *supra* note 29.

<sup>33</sup> *Id.*

each town [must] follow the dictates of their invaluable Constitution, by remonstrances to the legislature, and instructions to their several representatives.”<sup>34</sup> Any other method of redress would advance “anarchy and confusion so incident to mobs and conventions.”<sup>35</sup>

Under the penname Scribble Scrabble, Judge George Thatcher, a member of the First United States Congress, responded to Senex’s broad classification of lawful conventions as mobs.<sup>36</sup> Also a member of the Portland Convention, Thatcher separated the Convention from unlawful assemblies like the Shays’ insurgents on the grounds that the former “thought they were discharging their duty in a *legal way*.”<sup>37</sup> It is here that the exchange between Senex and Thatcher turned to the rules of constitutional interpretation. Senex’s response was one of strict construction. He believed that if the Declaration of Rights grants the mode to redress injuries, only through that constitutional vehicle may the people “request (or even demand)” such injuries be resolved.<sup>38</sup> In contrast, Thatcher interpreted the Declaration of Rights as a social compact with legislative constitutional limits. To Thatcher, the Declaration was not the totality of the people’s rights, but a list of rights that the government could never usurp.

Thatcher’s main problem with Senex’s interpretation was grouping the Shays’ insurgents, who were unlawfully armed and rebelling against the laws of Massachusetts, with the peaceful Portland Convention that was seeking “[e]nquiry and information” to erect themselves into a government.<sup>39</sup> Thatcher elaborated:

In one county the people meet in a Convention to collect the sentiments of the people, and lay them before the General Court. In another they assemble in town meetings, and consult upon the *public good*. In some counties the people assemble in bodies, and with force and arms, prevent the Courts of Justice sitting according to law. . . . When we consider the late Portland Convention, as to its constitution and to its end, it appears to me essentially different from the meetings of the people in some of the western counties . . . .<sup>40</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 161 (2007) (link).

<sup>37</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Oct. 5, 1786, at 2 (emphasis added).

<sup>38</sup> Senex, CUMBERLAND GAZETTE (Portland, Me.), Oct. 19, 1786, at 2.

<sup>39</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Nov. 2, 1786, at 1.

<sup>40</sup> *Id.* (emphasis added).

Thatcher's reference to the "public good" is of constitutional significance, for it was the entire basis by which eighteenth century lawmaking and constitutional interpretation was premised.<sup>41</sup> Most importantly, for the purposes of this Article, the reference to the "public good" is a premise that Thatcher would use to explain the "right to keep and bear arms" in the 1780 Massachusetts Constitution. Thatcher's basis for examining the constitutional restraints on the use of arms was to illustrate the impropriety of Senex's limited interpretation of the Declaration of Rights. In Thatcher's words: "[W]here the declaration secures a particular right, in itself alienable, or the use of a right, in the people, it does not at the same time contain, by implication, a negative of any other use of that right."<sup>42</sup>

For instance, Article XVII of the 1780 Massachusetts Declaration of Rights states, "The people have a right to keep and to bear arms for the common defence . . . and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."<sup>43</sup> Thatcher interpreted this provision as not prohibiting the people from "using arms for other purposes than common defence."<sup>44</sup> Thatcher reasoned that because Article XVII "does not contain a negative," "the people have the full uncontrolled use of arms, as much as though the Declaration had been silent upon that head."<sup>45</sup>

Thatcher was not claiming that Article XVII affords an unalienable right to arms for whatever purpose. He viewed the use of arms for other purposes as an "alienable right" that the legislature has the "power to controul" in "all cases . . . whenever they shall think the *good of the whole* require it."<sup>46</sup> However, Thatcher was arguing the Declaration recognizes core "rights and privileges" that are "esteemed essential to the very being of society; and therefore guarded, by being declared such, and prefixed to the constitution as a memento that they are never to be infringed."<sup>47</sup> To paraphrase, Thatcher viewed the Declaration of Rights as embodying a constitutional bottom upon which the legislature could never infringe. In the case of Article XVII this meant the Massachusetts Assembly could never de-

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<sup>41</sup> See 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778 30 (Gale 2010) (1794) (tracing the origins of the concept of the "public good" to Machiavelli); Samuel Adams, Mass. Lt. Gov., Speech to the Massachusetts House of Representatives and Senate (Jan. 17, 1794), in RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 33, 34 (1794) ("It is therein declared, that Government is instituted for the common good; not for the profit, honor, or private interest of any one man, family, or class of men."); see also *infra* note 107 and accompanying text (discussing the "public good" in lawmaking and constitutionalism).

<sup>42</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Dec. 8, 1786, at 1.

<sup>43</sup> MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII.

<sup>44</sup> Scribble Scrabble, *supra* note 42.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.*

prive the people from participating in the “common defence.” On the other hand, all other uses of arms were alienable and could be “abridged by the legislature as they may think for the *general good*.”<sup>48</sup>

On January 12, 1787, Senex replied to Thatcher’s interpretation of the Declaration of Rights. He feared that Thatcher was inferring that the general people had a right to abolish, separate, and reform government as seen fit.<sup>49</sup> Senex would turn Thatcher’s argument on its head. He argued if Article VII “contains no negative,” there was “no reason why [the people] have not this right” to “reform, alter, or totally change their government” “even when the safety does not require it.”<sup>50</sup> Senex applied the same reasoning to Thatcher’s interpretation of Article XVII, stating:

The people have a right to keep and bear arms for the common defence. Have they a right to bear arms against the common defence? According to the gentleman’s reasoning, I answer yes; for to say a man has a certain right, and that he is not denied any other use of the right, is most assuredly saying that he possesses that right *for every purpose*.<sup>51</sup>

Here, Senex revealed a fatal philosophical flaw in Thatcher’s interpretation of Article XVII. By the late eighteenth century, it was well-settled that it was a dangerous idea to interpret the “right to keep and bear arms” as including a right to revolt.<sup>52</sup> Such an interpretation ran afoul of the constitutional restraints placed on the right since its inception in the 1689 English Declaration of Rights.<sup>53</sup>

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<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> The Massachusetts Assembly would clarify this matter by passing a statute that made it only lawful to “bear arms for the common defence”:

Whereas in a free government, where the people have a right to bear arms for the common defence, and the military power is held in subordination to the civil authority, it is necessary for the safety of the State, that the virtuous citizens thereof should hold themselves in readiness, and when called upon, should exert their efforts to support the civil government, and oppose attempts of factious and wicked men, who may wish to subvert the laws and constitution of their country.

Act of Feb. 20, 1787, ch. 9, 1787 Mass. Laws 564 (providing for the “more speedy and effectual suppression of Tumults and Insurrections in the Commonwealth”).

<sup>50</sup> Senex, CUMBERLAND GAZETTE (Portland, Me.), Jan. 12, 1787, at 1.

<sup>51</sup> *Id.*

<sup>52</sup> Charles, *supra* note 30, at 32–35, 44–59.

<sup>53</sup> See Patrick J. Charles, “Arms for Their Defence?”: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 421–54 (2009) (discussing the American understand-

However, it seems that Senex was missing the thrust of Thatcher's argument. At no point in his previous editorials did Thatcher advocate the lawfulness of armed rebellion; he actually denounced such behavior as "essentially different"<sup>54</sup> and not seeking a redress of grievances "in a legal way."<sup>55</sup>

To clarify his stance, Thatcher offered the following response:

The right to reform or alter government, is not created by the Bill of Rights . . . [it] is a right independent of the Bill of Rights, and exists in the people anterior to their forming themselves into government . . . . Senex asks if the people have a right to bear arms against the common defence? I answer, that whatever right people had to use arms in a state of nature, they retain at the present time, notwithstanding the 17th article of the Bill of Rights.<sup>56</sup>

Thatcher's response clarifies that he was articulating the right of governmental self-preservation or what Blackstone deemed the "fifth auxiliary right."<sup>57</sup> He understood that once a civil compact is created, the people "surrender a certain portion of their alienable rights; or rather, to vest in certain persons, a power to make laws for, and controul the alienable rights of, the whole."<sup>58</sup> At the same time though, should the government fail to produce the "end of government," i.e. the "happiness of the people," the people, through their representatives, retain the power to reform or alter government.<sup>59</sup>

Thatcher elaborated on this point in a subsequent editorial, writing:

The right to institute government, and the right to alter and change a bad government, I call the same right: I see no difference between them. The end of this right is the *greatest happiness* of the greatest number of the people; and the means or object made use of, is government. This right I

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ing of this provision) (link); Charles, *supra* note 30, at 24–60 (discussing the legal restraints on Blackstone's fifth auxiliary right).

<sup>54</sup> Scribble Scrabble, *supra* note 39, at 2.

<sup>55</sup> Scribble Scrabble, *supra* note 37, at 2.

<sup>56</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Jan. 26, 1787, at 1.

<sup>57</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*139 ("The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.") (link).

<sup>58</sup> Scribble Scrabble, *supra* note 56, at 1.

<sup>59</sup> *Id.*



understand to be a physical power, under the direction of reason, to bring about this *happiness*. Therefore, when the people have agreed upon a certain set of rules, which they denominate government . . . they are binding, on the presumption that they will produce the degree of happiness before mentioned . . . . It is not the existence of government, or any agreement contained therein, that gives the people a right to destroy it when it does not answer the end for which it was instituted. The existence of a bad government only affords an opportunity for this *right* . . . to come into exercise.<sup>60</sup>

In its entirety, the Senex and Thatcher debate reveals much on constitutional interpretation, especially the founding generation's views on the "right to keep and bear arms." Although the 1780 Massachusetts Constitution only guaranteed the right for the "common defence,"<sup>61</sup> Thatcher reminds us that this does not foreclose other uses of arms for lawful purposes. As Thatcher stated in his penultimate editorial to Senex:

The question is not, whether two persons can have an exclusive right to the same thing, at one and the same time: but, whether the bill of rights, by securing to the people a right originally in them [in a state of nature] . . . thereby prohibits them the other uses of that right, which they also had originally a right to.<sup>62</sup>

Perhaps the most important aspect of the Senex and Thatcher debate is that it gives historical credence to the argument that only the "core" of the Second Amendment should receive elevated protection. Meanwhile, any interests that fall outside of this "core" should be given minimized protections,<sup>63</sup> especially if they fall within the accepted ideological and philosophical restraints as the founders understood.<sup>64</sup>

Thatcher illustrated this legal concept many times over.<sup>65</sup> He understood that the Bill of Rights imposes constitutional limits on the legislature. In the case of Article XVII this meant that the "right to keep and bear arms for the common defence" was "prefixed to the constitution" and was "never

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<sup>60</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Mar. 23, 1787, at 4.

<sup>61</sup> MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII.

<sup>62</sup> Scribble Scrabble, CUMBERLAND GAZETTE (Portland, Me.), Mar. 16, 1787, at 4.

<sup>63</sup> See *United States v. Chester*, 2010 U.S. App. LEXIS 26508, at \*24–26 (4th Cir. Dec. 30, 2010); see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 976–77 (2009) (link).

<sup>64</sup> For a working analysis of this historical approach, see Charles, *supra* note 4, at 14–30.

<sup>65</sup> See *supra* note 52 and accompanying text.

to be infringed.”<sup>66</sup> Meanwhile, all other uses of arms were “alienable right[s]” and could be “abridged by the legislature as they may think for the general good.”<sup>67</sup>

If one applies Thatcher’s concept of the “public good” to contemporary gun control laws, Professor Rosenthal’s concerns about the constitutionality of open-carry and conceal-carry restrictions are alleviated, and *Heller*’s classification of such prohibitions as “presumptively lawful”<sup>68</sup> is ideologically supported in history. While legal commentators may claim that there is little, if any, historical evidence to support the proposition that the framers would have agreed to open-carry or conceal-carry prohibitions,<sup>69</sup> they do so without understanding the ideological origins of gun control.<sup>70</sup>

It is common practice for legal commentators to envision the framing era as a utopia that casted off our Anglo and international origins to start anew.<sup>71</sup> However, such broad assertions fail to take into account that the framers were much attuned to English and international precedent. For instance, Associate Justice Samuel Chase kept a journal compiling all the British case law still in force within the United States,<sup>72</sup> John Marshall used the treatises of Hugo Grotius, William Blackstone, and Emer de Vattel to

<sup>66</sup> Scribble Scrabble, *supra* note 42.

<sup>67</sup> *Id.*

<sup>68</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.26 (2008) (discussing limitations on carrying weapons on “sensitive places”).

<sup>69</sup> See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1480–81, 1516–29 (2009) (link) [hereinafter Volokh, *Implementing the Right to Keep and Bear Arms*]; Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101–02 (2009), <http://www.columbialawreview.org/articles/the-first-and-second-amendments> (link) [hereinafter Volokh, *The First and Second Amendments*].

<sup>70</sup> Discarding the philosophical and ideological origins of gun control also runs afoul of the *Heller* and *McDonald* opinions. See Charles, *supra* note 4, at 21–30.

<sup>71</sup> For example, for over a century legal commentators have asserted that the Supreme Court created the Plenary Power Doctrine over aliens, citizenship, foreign affairs, and naturalization. See, e.g., L. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858–63 (1987) (describing Supreme Court cases expanding the federal government’s powers over immigration) (link); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–60 (1990) (detailing the development and contours of the Plenary Power Doctrine) (link). However, the Plenary Power Doctrine is deeply rooted in the Anglo-American tradition and was acknowledged as such by all the prominent constitutional commentators in the late eighteenth century. See Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. 61, 67–91 (2010) (link).

<sup>72</sup> See Samuel Chase, *British Case Law Citations* (1800) (unpublished journal, on file with the Library of Congress Rare Books Division, Washington, D.C.).

argue cases,<sup>73</sup> and some states adopted English statutes in their entirety even after Independence.<sup>74</sup>

This latter point is of particular significance in understanding the constitutionality of open-carry or conceal-carry prohibitions. In 1328, King Edward III and Parliament implemented the Statute of Northampton, making it unlawful “to go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere.”<sup>75</sup> The Statute remained in force in the states of Massachusetts, North Carolina, and Virginia even after the adoption of the U.S. Constitution.<sup>76</sup> In the case of North Carolina, the statute read almost verbatim by prohibiting riding armed “by night nor by day, in fairs, markets, nor in the presence of the King’s Justices, or other ministers, *nor in no part elsewhere*.”<sup>77</sup>

Perhaps the most important aspect of the Statute of Northampton is that it contains no intent requirement for the conduct to be otherwise unlawful.<sup>78</sup> One merely had to go or ride armed in “fairs, markets,” or other populated enclaves. The same was true for the 1285 statute of Edward I, which made it unlawful to go or wander “about the Streets” of London, “after Curfew tolled . . . with Sword or Buckler, or other Arms for doing Mischief . . . *nor any in any other Manner*, unless he be a great Man or other lawful Person of good repute[.]”<sup>79</sup> It was not until 1350 that there was any mention of an

<sup>73</sup> See James Iredell, Middle Circuit, 1793, Virginia 4, 5–6 (1793) (unpublished journal of oral arguments) (on file with the Library of Congress Rare Books Division, Washington, D.C.).

<sup>74</sup> For example, Maryland adopted and maintained the English common law and much of the statutory structure when it adopted its Constitution, following the Declaration of Independence. See MD. CONST. of 1776, DECLARATION OF RIGHTS, art. III (link). Cf. Tench Coxe, An Examination of the Constitution for the United States (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1778–1788, at 133, 137 (Paul Leicester Ford ed., The Lawbook Exchange, Ltd. 2009) (1888) (discussing the United States’ connection with its English origins, Coxe wrote, “we did not dissolve our connection with [England] so much on account of its constitution as the perversion and maladministration of it.”) (link).

<sup>75</sup> 2 Edw. 3, c. 3 (1328) (Eng.); see also 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.) (“[If] any Man of this Realm ride armed covertly or secretly with Men of Arms against any other . . . it shall be judged Treason”); 1 Jac. 1, c. 8 (1603–04) (Eng.) (also known as the Statute of Stabbing).

<sup>76</sup> See 2 THE PERPETUAL LAWS, OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT, IN 1798, at 259 (Worcester, Isaiah Thomas 1799) (confirming that no person “shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth”); FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60–61 (Newbern 1792) (confirming that no person may “go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the King’s Justices, or other ministers, nor in no part elsewhere”); A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 33 (Augustine Davis 1794) (confirming that no person may go or ride armed by night or day, in fairs, markets, or elsewhere, or in the presence of the Court’s Justices or other ministers of justice).

<sup>77</sup> MARTIN, *supra* note 76, at 61 (emphasis added).

<sup>78</sup> See 2 Edw. 3, c. 3 (1328) (Eng.).

<sup>79</sup> 13 Edw. 1 (1285) (Eng.) (Statutes for the City of London) (emphasis added).

intent requirement with going armed, but this statute did not amend or override the Statute of Northampton. Instead, it affirmed that it was a separate felony for “any Man of this Realm ride armed covertly or secretly with Men of Arms against any other.”<sup>80</sup> Furthermore, the 1350 statute clarified to the courts that such malicious intent did not qualify as treason, stating that riding armed “covertly or secretly . . . against any other . . . shall be judged [a] Felony or Trespass, according to the Laws of the Land of the old Time used, and according as the Case requireth.”<sup>81</sup>

But some commentators fail to recognize these legal differences and the ideological impetus of such statutes. For example, the ideological impetus for the Statute of Northampton was the potential danger posed by individuals going or riding armed, not just preventing malicious intent or the possession of dangerous and unusual weapons. In contrast, Professor Eugene Volokh<sup>82</sup> claims the Statute was “understood by the Framers as covering only those circumstances where carrying of arms was unusual and therefore terrifying.”<sup>83</sup> Quoting William Hawkins’s *Pleas of the Crown*, Volokh asserts the Statute solely stands for the legal proposition that “public carrying ‘accompanied with such circumstances as are apt to terrify the people’ was . . . seen as prohibited,” but “wearing common weapons’ in ‘the common fashion’ was legal.”<sup>84</sup>

However, this assessment of the historical record is misleading. First, Professor Volokh omits that Hawkins was referring to a legal exception for persons of “quality” or the nobility’s right to wear arms and be accompanied with armed escorts.<sup>85</sup> Such persons were exempt because they were

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<sup>80</sup> 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.). Differentiation between the 1350 statute and the Statute of Northampton is supported by Coke’s Institutes. See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 159–60 (London, E&R Brooke 1797) (showing the “clause of the statute 25 E. 3” was a treason distinction) (link).

<sup>81</sup> 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.).

<sup>82</sup> Briefly addressing Professor Volokh’s writings on the history of the Second Amendment is significant, for it is his opinions on which Professor Rosenthal in part relies. See Rosenthal & Malcolm, *supra* note 1, at 88.

<sup>83</sup> Volokh, *The First and Second Amendments*, *supra* note 69, at 101.

<sup>84</sup> *Id.* at 102 (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, § 9 (photo. reprint 1978) (1716)).

<sup>85</sup> The full quote to which Volokh refers reads: “That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace.” 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, § 9 (photo. reprint 1978) (1716) (link). This law was the exception to the general rule that it was unlawful for people to carry arms in public under the auspices of self-defense. Hawkins writes:

That a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from

presumed to be “in no danger of offending” the law, or having “an intention to commit any act of violence, or disturbing of the peace.”<sup>86</sup> This legal presumption would not have applied to the average subject or citizen. Not to mention, whether an individual was of noble birth did not matter if they wore any dangerous “armour in public, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault.”<sup>87</sup>

Second, Volokh’s characterization of the Statute of Northampton assumes Hawkins’ reference to “terrify” equates with actual intent or conduct to do harm with arms. However, if one takes into account eighteenth century restrictions on firearms and the actual text of the Statute, it would be presumed that the general carrying of pistols or firearms in populated areas, would have qualified as violating the Statute of Northampton. Take for instance a 1754 charge to the grand jury in London, where an assault was described as being committed should a person hold up their fist, “present[] a Gun,” or use “any other Instrument in a threatening Manner, where the Person threatened is within the Reach, or Effect of it.”<sup>88</sup> While one may debate what would constitute as “presenting a Gun,” openly carrying a firearm, flashing it, or having it loaded (in the eighteenth century this would generally require one physically holding the firearm parallel or upright) does “present” to others that you pose a potential threat more so than the average person.<sup>89</sup>

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his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man’s House is as his Castle.

*Id.* at 136, ch. 63, § 8.

<sup>86</sup> JAMES PARKER, *THE CONDUCTOR GENERAL . . . ADAPTED TO THESE UNITED STATES* 11 (New York, John Patterson 1788) (quoting 1 HAWKINS, *supra* note 85, at 136, ch. 63, § 9)

<sup>87</sup> *Id.* at 11–12.

<sup>88</sup> CHARGES TO THE GRAND JURY 1689–1803, at 385 (Georges Lamoine ed., 1992).

<sup>89</sup> The limits of eighteenth century firearm technology made it nearly impossible to holster or carry a loaded firearm, especially a pistol, but for very short periods. For the firearm to remain loaded the individual would have to take great care to carry the pistol upright or parallel to ensure the ball or shot was not dislodged and that the powder could be properly charged. For an overview of eighteenth century firearm technology, see WILLIAM E. BURNS, *SCIENCE AND TECHNOLOGY IN COLONIAL AMERICA* 110–14 (2005) (link). For contemporaneous evidence that one would generally have to “present” a loaded pistol and that it would have been seen as terrifying, see WILLIAM DUANE, *A REPORT OF THE EXTRAORDINARY TRANSACTIONS WHICH TOOK PLACE AT PHILADELPHIA, IN FEBRUARY 1799*, at 9–10 (Phila., Office of the Aurora 1799) (The testimony of Lewis Ryan was transcribed as follows: “He then pulled out a pistol and presented it towards the body of J.Gallagher . . . which part of the body, he could not expressly say. I supposed the person who pulled out the pistol to be insulting the congregation by some means or other . . . I felt very much alarmed at the sight of fire-arms, and I did not know how to act in the business, for it was difficult to engage with a man having fire-arms . . .”); *id.* at 43 (In light of the evidence, Judge Cox issued the following charge to the jury: “We do not see [the defendant] as a peaceable citizen now. Where is this good, this quiet man? [N]o, he has a loaded pistol in his pocket;

Third, even assuming Volokh's interpretation of the Statute of Northampton as the correct one, there being a "dangerous" requirement, it misses the ideological and philosophical point of the law—preventing public injury, ensuring the public peace, and providing for the "public good."<sup>90</sup> Take for instance James Davis's 1774 treatise, entitled *The Office and Authority of a Justice of the Peace*, which stated the Statute stood for the premise that "unusual and offensive Weapons" were prohibited "among the great Concourse of the People."<sup>91</sup> While there is room for debate as to what weapons would have qualified as "dangerous," "unusual," or "offensive," there is substantiated evidence to suggest that loaded firearms and pistols qualified in populated areas. This is supported by eighteenth century ordinances in Boston and Newburyport. As early as 1746 Boston made it unlawful for any person to "discharge any Gun or Pistol charged with Shot or Ball in town," including "any Part of the Harbour between the Castle of said Town[.]"<sup>92</sup> This ordinance was reaffirmed in 1768 by the Boston Selectmen, which included John Hancock.<sup>93</sup> The ordinance was required because "divers of the Inhabitants have been lately surprized and endangered by the firing of Muskets charged with Shot or Ball on the Neck, Common, and other Parts of the Town[.]"<sup>94</sup> Exceptions in both ordinances were given to militia during times of muster.<sup>95</sup> However, there were no exceptions for personal self-defense. In 1785, the town of Newburyport, Massachusetts adopted a similar provision:

That no person (excepting the militia, when under arms, on muster-days, and by command of their officers) shall fire off any sort of gun, pistol, squib, cracker or other thing charged or composed in whole, or in part of gun-powder, in any of the streets, lanes or public ways in this town, nor so near thereto as to affright any horse, or in any sort tend to affright, annoy or injure any person whatever—nor shall any person discharge at a mark or other—wise any gun, charged with ball, at any time or front of any place within this town, nor in any direction but such only as from time

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thus armed, he throws the gauntlet, by this he invited insult; he puts the whole church at defiance; he says come on with you, I am now ready for you. He seems to have wished to be attack . . .").

<sup>90</sup> For a great summary of the importance of the "public good" as a legal concept, see DUANE, *supra* note 89, at 21.

<sup>91</sup> JAMES DAVIS, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 13 (Newbern 1774).

<sup>92</sup> An Act to Prevent the Firing of Guns Laden with Shot or Ball in the Town of Boston, *reprinted in* BOSTON WEEKLY NEWS-LETTER, Sept. 18, 1746, at 2.

<sup>93</sup> RECORD COMMISSIONERS OF THE CITY OF BOSTON, SELECTMEN'S MINUTES FROM 1764 THROUGH 1768, at 307 (Boston, Rockwell & Churchill 1889).

<sup>94</sup> THE BOSTON POST-BOY & ADVERTISER, Sept. 5, 1768, at 1.

<sup>95</sup> *Id.*; Act to Prevent the Firing of Guns Laden with Shot or Ball in the Town of Boston, *supra* note 92.

to time shall be approved of and licensed by the town, or by the select-men thereof.<sup>96</sup>

Indeed, the ordinances said nothing about carrying unloaded firearms, but discharging and firing arms in general could be prohibited to protect the general welfare. Let us not forget there is substantial evidence that the founding generation viewed the assembling of arms without the authority of the government as dangerous to the public peace. While one may argue that prohibiting the carrying of firearms in public, open or concealed, substantially burdens an individual's right to personal self-defense,<sup>97</sup> such an argument fails to take into account that the founders sought to prevent public injury and limit potential riots, routs, tumults, and assemblages of arms.<sup>98</sup> This includes the Massachusetts Assembly passing such a statute to keep the peace from potential dangers like Shays' Rebellion.<sup>99</sup> These laws were premised on what was in the interest of the public good,<sup>100</sup> and viewed as essential to prevent public injury.

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<sup>96</sup> THE ESSEX JOURNAL AND THE MASSACHUSETTS AND NEW-HAMPSHIRE GENERAL ADVERTISER (Newburyport, Mass.), May 11, 1785, at 2.

<sup>97</sup> See Volokh, *Implementing the Right to Keep and Bear Arms*, *supra* note 69, at 1516–29.

<sup>98</sup> For some examples, see Act of Feb. 20, 1787, ch. 9, 1787 Mass. Acts 564; Act of Feb. 24, 1797, ch. 637, 1797 N.J. Laws 179; Act of Dec. 20, 1763, ch. 1233, *reprinted in* THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 748–49 (Albany, James B. Lyon, 1894); Act of 1705, ch. 128, 1705 Pa. Laws 153, *reprinted in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, (Phila., J. Bioren 1803) (link).

<sup>99</sup> On October 26, 1786 the following was passed into law by the Massachusetts Assembly:

That from & after the publication of this act, if any persons, to the number of twelve, or more, being armed with clubs or other weapons; or if any number of persons, consisting of thirty, or more, shall be unlawfully, routously, riotously or tumultuously assembled, any Justice of the Peace, Sheriff, or Deputy . . . or Constable . . . shall openly make [a] proclamation [asking them to disperse, and if they do not disperse within one hour, the officer is] . . . empowered, to require the aid of a sufficient number of persons in arms . . . and if any such person or persons [assembled illegally] shall be killed or wounded, by reason of his or their resisting the persons endeavouring to disperse or seize them, the said Justice, Sheriff, Deputy-Sheriff, Constable and their assistants, shall be indemnified, and held guiltless.

An Act to Prevent Routs, Riots, and Tumultuous Assemblies, and the Evil Consequences Thereof, *reprinted in* CUMBERLAND GAZETTE (Portland, Me.), Nov. 17, 1786, at 1.

<sup>100</sup> William Blackstone defined the “public good” as “nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law.” 1 WILLIAM BLACKSTONE, COMMENTARIES, \*139 (link). In other words, “the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce.” *Id.* Pennsylvania Judge Alexander Addison discussed the importance of the “public good” in America's constitutional system:

To produce virtue, or public utility, is the true end of government. Virtue is most effectually produced, by making it the interest of each individual, to promote the public good. That form of government must be good, which necessarily combines

Thus, although most modern day open-carry and conceal-carry prohibitions do not exactly parallel the Statute of Northampton or other eighteenth century firearms laws, their differences do not disparage that the government could make it unlawful to “go . . . armed”<sup>101</sup> in public areas,<sup>102</sup> and that legislatures must have the power to restrict the use, possession, and operation of arms for the “good of the whole.”<sup>103</sup> As Judge George Thatcher eloquently put it, unless the Constitution provides an affirmative and unalienable guarantee, any other use of arms can be “abridged by the legislature as they may think for the general good.”<sup>104</sup>

## II. A “WELL-REGULATED” PROBLEM: THE IMPORTANCE OF PRESERVING THE SECOND AMENDMENT’S PREFATORY LANGUAGE

Even before *District of Columbia v. Heller*, misconceptions of the framers’ “well-regulated militia” language polluted modern Second Amendment scholarship. Advocates for a broad interpretation of the Second Amendment asserted the myth that the individual use, ownership, and exercise of “arms” effectuated the constitutional purpose of a “well-regulated militia.”<sup>105</sup> This myth continues to pollute Second Amendment scholarship to this day.<sup>106</sup>

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the individual, with the general, interest; and that form of government must be bad, which necessarily disjoins them. That therefore must be the best form of government, which most effectually and inseparably combines and unites the general and individual interest: and this is most effectually done, in a democratic republic.

ALEXANDER ADDISON, CHARGES TO THE GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT IN THE STATE OF PENNSYLVANIA 93 (Wash., John Colerick 1800). Addison further wrote on the importance that legislatures do not give into popular sentiment that deviates from the public good. He wrote, “[I]f Officers are . . . seduced, by a love of what is called popularity, to give that kind of flattery to the people . . . in accommodating their conduct to the humour of the day, or the solicitation of the applicant,” instead of the “public good,” the “true end of the office, *-serving* the public is perverted into a false end, *pleasing* the public; the duty of the office is betrayed; the constitutional end of the office is defeated[.]” *Id.* at 157–58.

<sup>101</sup> 2 Edw. 3, c. 3 (1328) (Eng.).

<sup>102</sup> See DAVIS, *supra* note 91, at 13; MARTIN, *supra* note 76, at 61; PARKER, *supra* note 86, at 11–12.

<sup>103</sup> Scribble Scrabble, *supra* note 42.

<sup>104</sup> *Id.*

<sup>105</sup> See STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 61–65, 85, 144 (2d ed. 1994); Stephen P. Halbrook, *St. George Tucker’s Second Amendment: Deconstructing “The True Palladium of Liberty”*, 3 TENN. J.L. & POL’Y 120, 130 (2007).

<sup>106</sup> See David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 66–67 (2010) (pointing out this line of argument), [http://www.cardozolawreview.com/index.php?option=com\\_content&view=article&id=133:hardy201061&catid=20:firearmsinc&Itemid=20](http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=133:hardy201061&catid=20:firearmsinc&Itemid=20) (link).



But to the founding generation, a “well-regulated militia” indicated something far more specific—and far more important—than a well-armed citizenry. A “well-regulated militia” provided constitutional balance and united the people in defense of our rights, liberties, and property; to extol Machiavelli’s *virtù* and unite the people as a common community.<sup>107</sup> It was a constitutional body of citizens capable of bearing arms where men would train together in the Art of War and an *esprit de corps* would flourish.<sup>108</sup> It was a body of citizen soldiers professionally disciplined and trained to prevent the establishment of standing armies and to provide a constitutional check on the federal government.<sup>109</sup>

A “well-regulated militia” was not “merely . . . well-trained,” as Professor Malcolm asserts.<sup>110</sup> Such a loose definition ignores the rich history of Machiavellian influence on the concept of a constitutional militia,<sup>111</sup> the detailed seventeenth and eighteenth century tracts on the constitutional significance of a “well-regulated militia,”<sup>112</sup> the inclusion of the institution in five state constitutions by 1789,<sup>113</sup> and the First and Second Congress debates over the institution when implementing the 1792 National Militia Act.<sup>114</sup> Furthermore, it makes little sense for the Founding Fathers to have toasted to a “well-regulated militia”<sup>115</sup> and referred to the constitutional body as the “palladium of liberty”<sup>116</sup> if “well-regulated” merely meant “well-trained.” The fact of the matter is a “well-regulated militia” was seen as crucial to the success of a democratic government.<sup>117</sup> Upon returning to

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<sup>107</sup> See Charles, *supra* note 6, at 6–54.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Rosenthal & Malcolm, *supra* note 1, at 106.

<sup>111</sup> See J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) (link); J.G.A. Pocock, *Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549 (1965).

<sup>112</sup> Charles, *supra* note 6, at 6–16.

<sup>113</sup> DECLARATION OF RIGHTS AND FUNDAMENTAL RULES art. XVIII (Del. 1776); MD. CONST. of 1776 art. XXV (link); N.H. CONST. of 1784 art. XXIV (link); N.Y. CONST. of 1777 art. XL (link); DECLARATION OF RIGHTS art. XIII (Va. 1776).

<sup>114</sup> See Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL’Y (forthcoming 2011) (manuscript at 9–40), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1705564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705564) (link).

<sup>115</sup> See Charles, *supra* note 6, at 50 n. 381, 55.

<sup>116</sup> *Id.* at 44–50, 55; Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment and Originalist Methodology*, 103 NW. U. L. REV. COLLOQUY 1541, 1542 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/13/LRColl2009n13Cornell.pdf> (link). Some commentators have improperly asserted that the founders viewed “arms” or individual self-defense as the “palladium of liberty.” See Stephen P. Halbrook, *supra* note 105; Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1220 (1996) (arguing that the “true palladium of liberty” includes armed individual self-defense) (link); see also *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008) (stating that Tucker was describing armed individual self-defense).

<sup>117</sup> Charles, *supra* note 6, at 25–54.

the Portland Convention, one editorial writer even commented that, should Maine form a separate state, it was important for the new government to include “a well regulated Militia of the People, between fifteen and forty years old; and none to be eligible to any office among them, but such as first serve in the ranks.”<sup>118</sup>

I agree with Professor Malcolm’s dismissal of Professor Rosenthal’s analysis of a “well-regulated militia.”<sup>119</sup> Indeed, Professor Rosenthal is correct that the framers envisioned that the states retain “general regulatory power over the possession and carrying of firearms[.]”<sup>120</sup> However, it is a historical invention to assert that the Second Amendment’s preamble in any way refers to the general regulation of “arms,” for this understanding of the phrase “well-regulated militia” is not at all supported by the historical record.

Professor Rosenthal seems to arrive at his thesis by mistakenly equating the general people with the unorganized militia.<sup>121</sup> But the Second Amendment only speaks of the right to “keep and bear arms” in the constraints of a “well-regulated militia,” not an unorganized militia.<sup>122</sup> Furthermore, Rosenthal conflates the *Heller* right of individual self-defense in the home with that of a “well-regulated militia” right to “keep and bear arms.”<sup>123</sup> The two protections are distinct in both law and history. As the *Heller* decision makes clear, the issue before the Court was not the constitutional scope of “keeping and bearing” arms to effectuate a “well-regulated militia.” Instead, the holding was that the Second Amendment also protects the right to use handguns in the home for self-defense.<sup>124</sup> It was only this narrow holding that the *McDonald* decision affirmed and incorporated to the States, as is evidenced by the hundred-page plurality opinion’s failure to address the phrase “well-regulated militia.”

To be precise, the Supreme Court has recognized that the Second Amendment contains two “core” rights. The first is the right of “the people” to possess handguns for self-defense at home. Although the

<sup>118</sup> A *Watch-Word to the People of Maine*, THE CUMBERLAND GAZETTE (Portland, Me.), Oct.19, 1786, at 2.

<sup>119</sup> Rosenthal & Malcolm, *supra* note 1, at 106.

<sup>120</sup> *Id.* at 93.

<sup>121</sup> This myth has seeped into some appellate courts. See, e.g., *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009) (Gould, J., concurring), *vacated en banc*, 575 F.3d 890, 890 (9th Cir. 2009) (link); *Silveira v. Lockyer*, 328 F.3d 567, 582 (9th Cir. 2003) (Kleinfeld, J., dissenting) (link). However, Supreme Court precedent limits the “militia” to those who are capable of bearing arms. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800 (2008) (confirming its holding in *Miller*); *United States v. Miller*, 307 U.S. 174, 179 (1939) (link); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (link). For a historical analysis of who constitutes the militia in the constraints of the 1792 National Militia Act, see Charles, *supra* note 114, at 41–46.

<sup>122</sup> The founders understood the difference between an “unregulated” or “ill-regulated militia” from that of a “well-regulated militia.” See Charles, *supra* note 6, at 6–17.

<sup>123</sup> Rosenthal & Malcolm, *supra* note 1, at 92–94.

<sup>124</sup> *Heller*, 128 S. Ct. at 2801, 2822.

Second Amendment does not expressly state this right, the *Heller* Court determined the right to be the “central component”<sup>125</sup> due to its Anglo origins<sup>126</sup> and contemporaneous state analogues.<sup>127</sup> The second “core” right is that of participating in the common defense in a “well-regulated militia” force.<sup>128</sup> Participation ensured citizens understood and appreciated life, liberty, and property, and provided a constitutional counterpoise to standing armies by ensuring the people would be dependent upon themselves for the national defense.<sup>129</sup>

Naturally, the two “core” rights are distinct in what they protect. The “core” right to armed individuals’ self-defense of the home with a handgun is divorced from the militia, and falls within the general police power of government. Meanwhile, the “core” right to participate in defending one’s liberties in a “well-regulated militia” is a right intimately connected with government. It is a right severely limited in scope because the federal and state governments have concurrent power to arm, organize, and discipline the militia, with the state governments possessing plenary authority to train the militia.<sup>130</sup>

At the same time, however, the two “core” rights are interrelated in that both are controlled by what is in the interest of the “public good.” Just as legislatures may restrict or prohibit the individual use, possession, and operation of arms “whenever they shall think the good of the whole require it,”<sup>131</sup> the founders believed in unfettered governmental regulation over the militia that “will be productive of the greatest public benefit.”<sup>132</sup> An ano-

<sup>125</sup> *Id.* at 2801.

<sup>126</sup> *See id.* at 2798–99. The Court came to this conclusion by adopting Professor Malcolm’s thesis. *See* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994) (link). However, the consensus among English historians is Malcolm’s thesis “is flawed on this point.” Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 6–40, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (No. 08-1521) (link).

<sup>127</sup> *See Heller*, 128 S. Ct. at 2802–03; PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. XIII (“That the people have the right to bear arms for the defence of themselves and the state”) (link); VT. CONST. OF 1786, DECLARATION OF RIGHTS, art. XVIII (“That the people have a right to bear arms for defence of themselves and the State”) (link).

<sup>128</sup> *See Presser v. Illinois*, 116 U.S. 252, 265 (1886); J.G.A. POCOCK, 1 *BARBARISM AND RELIGION: THE ENLIGHTENMENTS OF EDWARD GIBBON, 1737–1764*, at 104 (1999) (link); Charles, *supra* note 6, at 38–47.

<sup>129</sup> *See generally* WILLIAM THORNTON, *THE COUNTERPOISE, BEING THOUGHTS ON A MILITIA AND STANDING ARMY* (2d ed. 1753) (describing the necessity and importance of obtaining a good militia); GRANVILLE SHARP, *TRACTS, CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE BY A FREE MILITIA* (photo. reprint, Goldsmiths, 1903) (1782).

<sup>130</sup> U.S. CONST. art. I, § 8 cl. 16 (link); Charles, *supra* note 114, at 20–33, 47–52.

<sup>131</sup> Scribble Scrabble, *supra* note 42.

<sup>132</sup> House of Representatives, On the Militia Bill, December 24, 1790, *reprinted in* THE FEDERAL GAZETTE AND PHILADELPHIA DAILY ADVERTISER, Jan. 10, 1791, at 4; *see also id.* (“[W]e cannot but be convinced, that the authority was intended to be given us for the establishment of an effective militia—a militia that hitherto was not so effectually established as to censure a sufficient defence against foreign invaders; or efficient enough to destroy the necessity of a standing national force; or in case of such a force being raised, and turned against the liberties of our fellow-citizens, adequate to repel the hostile

nymous 1789 editorial in the *Independent Chronicle* illustrates this very point by posing the following question: “[W]hat would you think of a militia who should use their arms to oppress, terrify, plunder, and vex their peaceable neighbours, and then say they were armed for the *common good*, and must be free?”<sup>133</sup>

The question was posed to illuminate the point that the “freedom of the press” is a right that could be regulated to protect the “reputation,” “feelings,” and “peace of a citizen[.]”<sup>134</sup> This same premise of the “common good” holds true with the “right to keep and bear arms” to effect the Constitution’s “well-regulated militia.” As the anonymous writer pointed out, “there are laws to restrain the militia,” and any laws that restrict the freedom of the press are similar because both “prevent the wonton injury and destruction of individuals” and ensure there is a legal “line some where, or the peace of society would be destroyed by the very instrument designed to promote it.”<sup>135</sup>

### CONCLUSION

As Second Amendment jurisprudence moves forward, it is improper for legal commentators to claim that the history of the founding generation does not provide us with any historical guideposts, clues, or *originalist* insight as to the constitutionality of modern gun control regulations or prohibitions. Restrictions on “arms” date back to the beginning of our Anglo heritage and evolved based on the interests of the “public good.” Indeed, the Constitution provides unalienable rights that legislatures may never infringe upon. However, in the constraints of the Second Amendment, the Supreme Court has only identified two “core” rights<sup>136</sup>—both of which have a strong historical pedigree that can provide the courts with insight into the amendment’s intended meaning and proper purpose.

While modern-day gun control laws will never exactly parallel their eighteenth century counterparts, the founders adhered to certain philosophical and ideological restraints on “right to arms” that the courts can apply today.<sup>137</sup> Perhaps most importantly, the founders saw a legal difference between the right to “keep and bear arms for the common defence” as dis-

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attacks of mad ambition. Let us not, by false construction, admit a doctrine subversive of the *great end* which the constitution aimed to secure, namely, perfection to the union, the means of insuring domestic tranquility, and providing for the common defence.”) (emphasis added).

<sup>133</sup> Liberty, THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston), Aug. 20, 1789, at 1 (emphasis added).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> For the Second Amendment as a militia right, see *United States v. Schwimmer*, 279 U.S. 644 (1929); *Presser v. Illinois*, 116 U.S. 252 (1886). For the Second Amendment as a right to a handgun in the home for personal self-defense, see *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801, 2822 (2008).

<sup>137</sup> Charles, *supra* note 4, at 23–38.

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tinct from other uses of arms. Legal commentators need to recognize this legal distinction; for a militia, organized or unorganized, falls within a different subset of the law. This distinction is not only recognized by Supreme Court precedent, but can be found in the text of the Constitution,<sup>138</sup> and was even acknowledged by Freedmen during the tumultuous Reconstruction period.<sup>139</sup>

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<sup>138</sup> U.S. CONST. art. I, § 8 cl. 16.

<sup>139</sup> Charles, *supra* note 4, at 57–76.